

No. 14,727

United States Court of Appeals
For the Ninth Circuit

EVA ROSE BOLING,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR APPELLANT.

RALPH L. BAKER,

Easton Building, Oakland, California,

J. ADRIAN PALMQUIST,

Central Bank Building, Oakland, California,

NUBAR TASHJIAN,

Phelan Building, San Francisco, California,

Attorneys for Appellant.

FILED

SEP 12 1955

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Statutes and rules involved.....	2
Jurisdiction	2
Statement of the case	3
Issues presented	4
Argument	5
I. Abuse of discretion	5
II. The court below was precluded from basing its order on events that transpired in this action prior to the twelfth day of July, 1954.....	8
Conclusion	11

Table of Authorities Cited

Cases	Page
Boyce v. Boyce, 18 Atl. 2d 298, 19 N.J. Misc. 143.....	10
Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406.....	5
Partmar Corp. v. Paramount Pictures Theaters Corp. (Cal.), 74 S. Ct. 414, 347 U.S. 89, 98 L.Ed. 532.....	9
Peardon v. Chapman, 169 F. 2d ⁹⁰⁹ 902	5
Red Warrior Coal & Min. Co. v. Boron, 194 F. 2d 578.....	5
Shotkin v. Westinghouse Elec. & Mfg. Co., 169 F. 2d 825...	5
Spilker v. Hankin, 188 F. 2d 35, 88 U.S. App. D.C. 206.....	9
Timmons v. United States, ¹⁷⁴ 195 F. 2d 357, cert. denied 73 S.Ct. 59, 344 U.S. 844, 97 L.Ed. 656, rehearing denied 73 S.Ct. 174, 344 U.S. 882, 97 L.Ed. 383.....	5
United States v. Bower, 95 F. Supp. 19.....	9
United States v. Pacific Fruit & Produce Co., 138 F. 2d 367.	5

Rules

Federal Rules of Civil Procedure for the United States Dis- trict Courts, Title 28, U.S.C.A.:	
Rule 41(b)	2
Rule 60(b)	2

Statutes

Federal Tort Claims Act, Title 28, U.S.C.A.:	
Section 1346(b)	3
Section 2671	3
Section 1291	2

No. 14,727

**United States Court of Appeals
For the Ninth Circuit**

EVA ROSE BOLING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

BRIEF FOR APPELLANT.

JURISDICTION.

Plaintiff-appellant appeals from an order of the United States District Court for the Northern District of California, Southern Division, entered on the 30th day of December 1954, dismissing appellant's complaint with prejudice for lack of prosecution, and an order of the District Court entered the 29th day of December 1954, granting defendant-appellee's motion to dismiss for lack of prosecution and the amendment thereto entered the 14th day of January 1955.

Jurisdiction is conferred upon this Court to hear this appeal by virtue of Title 28, U.S.C.A., Sec. 1291.

STATUTES AND RULES INVOLVED.

Federal Rules of Civil Procedure for the United States District Courts, Title 28 U.S.C.A.

Rule 41(b). Dismissal of Actions—Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 60(b). Relief From Judgment or Order—Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3)

fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for the reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., sec. 1655, or to set aside a judgment for fraud upon the court . . .

STATEMENT OF CASE.

Appellant filed complaint for damages against the United States on the 31st day of July 1951 under the authority of the Federal Tort Claims Act, Title 28, U.S.C.A., sec. 1346(b), and sec. 2671. On the 3rd day of June 1953 appellant's cause was dismissed for lack of prosecution. On the 12th day of July 1954, the court below, after hearing appellant's motion to vacate the court's order of dismissal of June 3, 1953 and to revive appellant's cause, made its order vacating the order of dismissal of June 3, 1953 and ordered the cause revived. This proceeding was vigorously opposed by defendant appellee. Thereupon, the par-

ties herein made their preparations for trial on the merits of appellant's cause.

On the 10th day of December 1954, appellant filed notice and motion to set her cause for trial, and this motion was heard on the 20th day of December 1954. Since the appellee opposed this motion vigorously on the grounds that they were not yet ready to defend in this action, the court below ordered appellant's motion to be continued to the 24th day of January 1955. On the 22nd day of December 1954, only two days after the hearing on appellant's motion to set, appellee filed notice and motion in the court below for dismissal of appellant's cause for lack of prosecution, with an order attached showing date of service. This motion was heard, argued and submitted in the court below on the 27th day of December 1954. That court then issued its order on the 30th day of December 1954, and the 29th day of December 1954 with an amendment thereto dated the 14th day of January 1955, granting appellee's motion and dismissing with prejudice appellant's complaint for lack of prosecution. And on the 25th day of February 1955 appellant noticed her appeal.

ISSUES PRESENTED.

Appellant's statement of points is resolved into these basic issues:

1. Did the District Court abuse its discretion by dismissing appellant's complaint for lack of prosecution?

2. Was the District Court precluded from basing its orders on events that transpired in this action prior to the 12th day of July 1954?

ARGUMENT.

I. ABUSE OF DISCRETION.

Federal courts have consistently held that it is within the sound discretion of the trial court to dismiss a complainant's cause of action where the complainant has failed to prosecute his action with reasonable diligence. This power of dismissal for lack of prosecution rests in the inherent powers of the court and is expressly conferred by Rule 41(b) of the Federal Rules of Civil Procedure. On appeal, relief from such a dismissal will be granted if the court below has abused its discretion.

Shotkin v. Westinghouse Elec. & Mfg. Co., 169 F. 2d 825;

Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406;

U. S. v. Pacific Fruit & Produce Co., 138 F. 2d 367;

Timmons v. U. S., ¹⁹⁴~~195~~ F. 2d 357, Cert. denied 73 S.Ct. 59, 344 U.S. 844, 97 L.Ed. 656, Re-hearing denied 73 S.Ct. 174, 344 U.S. 882, 97 L.Ed. 383;

Red Warrior Coal & Min. Co. v. Boron, 194 F. 2d 578;

Peardon v. Chapman, 169 F. 2d ⁷⁰⁹~~902~~.

Appellant's cause of action was revived by order of the court below on the 12th day of July 1954, over the vigorous opposition of appellee (T.R. pp. 15-19, 47-55). Subsequent to the revival of appellant's action, both parties took steps to prepare for trial including the taking of depositions and interrogatories (T.R. p. 5). Nowhere in the record of this matter from the date of revival of appellant's cause to the date of its dismissal on December 29, 1954, does it appear that appellant lacked diligence or sat upon her rights.

Indeed, the record for that period of time shows the parties to be unusually active in preparing appellant's cause for trial.

On December 10, 1954, less than five months from the date of restoration of appellant's cause, appellant filed her motion to set her cause for trial and appellee appeared in opposition at the hearing of this motion on the 20th day and obtained a continuance (T.R. p. 5). Appellee's affidavit in opposition to appellant's motion to set cause for trial (T.R. pp. 20-25) lucidly explains appellee's unpreparedness for trial and asks the court for a continuance upon this ground. Nowhere in that affidavit does there appear a hint or suggestion that appellant has been derelict in the prosecution of her cause. The appellant had demonstrated her willingness to pursue her revitalized cause with dispatch, and appellee by his own admission was unprepared for trial. Only two days after the hearing on appellant's motion to set, and only two days after appellee's ready assertion that he was unprepared for trial, appellee asserted the astounding

proposition that appellant's cause ought to be dismissed for lack of prosecution! Appellee submitted his new-found proposition to the court below on December 22, 1954 in the form of a motion, supported by affidavit, to dismiss appellant's cause for lack of prosecution, and the hearing on this motion was set before the court below for the 27th day of December 1954 (T.R. pp. 27-35).

Appellee's affidavit (T.R. pp. 31-35) in support of his motion to dismiss appellant's cause is submitted to the inspection of this Court. Nowhere in that affidavit does there appear the suggestion that appellant lacked diligence. It simply again expresses appellee's unpreparedness for trial and this is made the grounds for a dismissal of appellant's cause.

The District Court's order granting motion to dismiss, dated December 29, 1954 (T.R. p. 36) and the amendment thereto dated January 14, 1955 (T.R. p. 38) does not indicate in what manner appellant was derelict after the restoration of her cause on July 12, 1954. The court below said (T.R. p. 36) "At all times since the cause was at issue the calendar of this court was such that the cause could have been set for trial and promptly tried." And in its amendment to its order of December 29, 1954, the court further said ". . . the basis for the order was the conclusion that the entire record of this proceeding shows that there has been a failure to diligently prosecute the action and that the cause has become stale."

Nor does the District Court's order dismissing appellant's complaint with prejudice contain any allega-

tion of how the appellant was derelict in prosecuting her cause, other than a brief assertion that the court's order was made dismissing the action for failure to prosecute.

Yet this very same court ordered reinstatement of appellant's cause after a full hearing, and now fails to show in what respect appellant failed to diligently prosecute. The only difference in the court below that reinstated from that of the court that dismissed was one of personnel.

It is submitted to this Court that appellant was diligent in prosecuting her cause after restoration, and appellee has not claimed nor found the appellant to be derelict in prosecuting her cause. Indeed, appellee makes citations only of his own unpreparedness and none whatever of appellant's.



II. THE COURT BELOW WAS PRECLUDED FROM BASING ITS ORDER ON EVENTS THAT TRANSPIRED IN THIS ACTION PRIOR TO THE TWELFTH DAY OF JULY, 1954.

It is submitted to this Court that the court below was precluded from treating appellant's cause as though the order of restoration on July 12, 1954 was never made. An order of restoration was in fact made on July 12, 1954 upon notice and motion, a hearing was had, and appellant's cause was restored over vigorous opposition of appellee (T.R. pp. 17-19, 47-55).

It will be noted that the grounds of appellee's motion to dismiss for lack of prosecution filed the

22nd day of December 1954 is, among other things, “. . . most particularly the affidavit of Charles Elmer Collett, Assistant United States Attorney for the Northern District of California, dated July 12, 1954, which affidavit was filed in opposition to plaintiff’s motion to vacate the order of dismissal . . .” Appellee’s motion to dismiss is an independent motion having no relationship to appellant’s former motion to reinstate. The argument which failed the appellee on July 12, 1954 is again resorted to by appellee. Shall a thing adjudged have no sanctity?

Black’s Law Dictionary, Third Edition, at page 1540 defines *res judicata* as “a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment.”

The doctrine of “*res judicata*” is the technical formulation of public policy that there be an end to litigation, that a contested issue once settled shall be binding upon the parties thereto, that matters once tried shall be considered forever settled.

Spilker v. Hankin, 188 F. 2d 35, 38, 88 U.S. App. D.C. 206;

Partmar Corp. v. Paramount Pictures Theaters Corp. (Cal.) 74 S.Ct. 414, 415, 347 U.S. 89, 98 L.Ed. 532;

U. S. v. Bower, 95 F. Supp. 19, 20.

It is not contended by appellant that the court below was precluded from examining the entire record of this cause in determining whether appellant had been derelict in prosecuting her cause after its restoration on July 12, 1954. It is appellant’s contention

that the court below was bound by its own determination of July 12, 1954 and could only consider the appellant's activity subsequent to July 12, 1954, and, if necessary in the light of the entire record of this cause. However, appellee and the court below treated the determination of the District Court of July 12, 1954 lightly, if at all, and indeed it would appear as though appellant's cause were tried as though it were coming upon the dismissal calendar for the first time.

The finding of the court below on July 12, 1954 that appellant's case was entitled to be restored was binding upon the parties hereto of all the issues there determined or that could have been there determined. And the court below erred in not limiting itself to the appellant's activity subsequent to the restoration of appellant's cause of action.

Boyce v. Boyce, 18 Atl. 2d 298, 299, 19 N.J. Misc. 143.

After the restoration of appellant's cause on July 12, 1954, appellee sought no rehearing of the court's order of restoration but went ahead as though the case had been in fact restored and prepared its case for trial. Both parties to the action, in good faith, prepared for the trial of appellant's cause, until appellee found the task of preparing its case too arduous and applied for a dismissal of appellant's cause.

Were the District Court's order of restoration of July 12, 1954 meaningless, then we must subscribe to the theory that no litigation is final and all issues may be interminably litigated and relitigated with no re-

gard to the harassment caused to parties litigant, not to mention the chaos that may be heaped upon the courts.

CONCLUSION.

1. The court below abused its discretion by ordering dismissal of appellant's cause, for it is nowhere demonstrable that appellant lacked diligence.

2. The court was precluded from basing its order of dismissal upon the entire record of this cause, rather than upon the performance of appellant subsequent to the restoration of her cause. It was error of the court below to disregard its findings upon its order of restoration of appellant's cause on July 12, 1954.

Dated, San Francisco, California,
September 12, 1955.

RALPH L. BAKER,
J. ADRIAN PALMQUIST,
NUBAR TASHJIAN,
Attorneys for Appellant.

